In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-605

SANDRO MILO WYATT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a bench trial on stipulated facts in the United States District Court for the Southern District of Texas, petitioners were convicted of possessing approximately 215 pounds of marihuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Wyatt was sentenced to two years' imprisonment, to be followed by a special parole term of three years. Petitioner Willoughby was sentenced to three years' imprisonment, with all but

three months of the sentence to be served on supervised probation, to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. B).

The stipulated facts showed that a vehicle driven by petitioner Wyatt and in which petitioner Willoughby was a passenger was stopped by Border Patrol officers at a fixed immigration checkpoint near Falfurrias, Texas, on October 30, 1972, for a "routine immigration check" (Pet. App. 19-20). After ascertaining that both occupants were citizens of the United States, the officers asked petitioner Wyatt to open the trunk of the vehicle to check for the presence of concealed aliens. When Wyatt opened the trunk, the officers detected a strong odor of marihuana. An examination of suitcases in the trunk revealed the marihuana that petitioners were convicted of possessing (*id.* at 20).

Petitioners contend that *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which invalidated a warrantless "roving patrol" search of an automobile for concealed aliens, conducted without probable cause to believe that the vehicle contained aliens—should be applied retroactively to invalidate the search of their vehicle at a fixed immigration checkpoint. However, this Court held in *Bowen* v. *United States*, No. 73-6848, decided June 30, 1975, that *Almeida-Sanchez* should not be applied retroactively to require the suppression of evidence seized pursuant to a pre-*Almeida-Sanchez* search of a vehicle for aliens at a fixed immigration checkpoint. Since the search of

petitioner's vehicle occurred prior to the *Almeida-Sanchez* decision, the court of appeals correctly affirmed petitioners' conviction on the authority of *Bowen* (Pet. App. 16-17). See also *United States* v. *Peltier*, No. 73-2000, decided June 25, 1975.

Contrary to petitioners' assertion, *Bowen* is not distinguishable on the ground that *Almeida-Sanchez* was decided prior to their trial. It is the prevailing Fourth Amendment law at the time the officer acted, not at the time of trial, that determines the applicability of the exclusionary rule. See, *e.g.*, *Bowen* v. *United States*, *supra*, slip op. 4; *United States* v. *Peltier*, *supra*, slip op. 11; *Desist* v. *United States*, 394 U.S. 244, 253.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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